

THE BERING SEA AWARD.

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During the present year one more instance has been added to a list already considerable and honorable, of disputes successfully settled by special arbitration on the part of Great Britain and the United States. The award of the commission, to which the settlement of five questions relating to the sealing controversy was referred, was made in August. It may be of interest to attempt very briefly to state what was and what was not decided by this award, and to characterize the policy of our government and the arguments of our counsel in view of it. The facts agreed upon between the parties were that the fur seal was largely diminished in numbers and seemed threatened with extinction. But there existed an irreconcilable difference of opinion as to the cause of this, the experts of the United States, most of them, holding that pelagic slaughter was accountable for it, while those of Great Britain maintained that these unhappy results sprang from the unscientific methods of killing on the Pribilof Islands, practiced by the licensees. The question at issue was this: Has the United States acquired, either through an exclusive jurisdiction over the waters of Bering Sea or through a property right in seals breeding there, the right to protect them in the open sea by force, or must such protection spring from the joint action of the two governments? And if the latter is true, what regulations are necessary to accomplish the purpose? The fact that Great Britain was willing to join in the reference of this latter question, is an important one. It indicated clearly, what she had maintained throughout, though not always with sufficient energy to overcome the hampering influences of the British colonies on this continent, that she desired to preserve the seals from threatened extinction, that the real question was one of method, but that she objected to the assertion of exclusive right in the matter by the United States. This fact should be taken as the key to her policy. It certainly made the task of our government simpler and, as may appear later, its second policy of doubtful expediency.

With this preface let us see what the actual award was.

In the first place it decided, that though the United States succeeded to all the rights of Russia in Alaska, its islands and

waters, as acquired by the Seward purchase of 1867, exclusive jurisdiction over the Bering Sea outside of a coast sea stretching a cannon shot from land, was not one of them. In this all the arbitrators concurred save one, Senator Morgan.

Again the same arbitrators decided that Great Britain had never recognized an exclusive jurisdiction on the part of Russia over the seal fisheries in the Bering Sea outside of the usual territorial waters.

Thirdly, it decided unanimously that the Bering Sea as mentioned in the treaty of 1825 (between Great Britain and Russia) formed part of the Pacific Ocean. And lastly it decided, the United States arbitrators both dissenting, that this country has "no right to the protection of a property in the seals frequenting its islands in the Bering Sea, when the same are found outside the ordinary three-mile limit." Thus the claims of the United States to an exclusive right to protect the Pribilof seals at sea, whether arising from jurisdiction or from ownership was denied.

Proceeding now to the regulations for their protection, made necessary by this denial of the right of our country alone to deal with the subject, the arbitrators by a vote of four to three, the Canadian and both American members dissenting, laid down the following scheme:

Sealing shall never be carried on within sixty geographical miles of the Pribilof Islands.

Within the Bering Sea excluding this sixty-mile zone, and over a wide stretch of the North Pacific Ocean (north of the latitude of Port Harford in Southern California and east of the 180th degree of longitude) sealing shall be allowed on these conditions only: by sailing vessels; under special license; carrying a distinguishing flag; from August 1st to May 1st; using neither nets, guns nor explosives; with provision for reporting number and sex of the take, and date and place of capture; and with vague regulation of the fitness of the crews. From these regulations the Indians were exempted under certain conditions.

Subject to revision after five years, these rules will govern the action of the two powers until they agree to abolish or modify them. Whether they are fitted to secure their object, the preservation of the fur seal, the sequel only can show. Doubtless in part they are difficult of determination, *e. g.* the position of the sixty-mile limit in foggy weather; and in part they may prove easy to evade. Their close season is rather short, but they cover very much more water than the mere Bering Sea. Much good may fairly be hoped for from them.

One or two points in the controversy were not decided. Though suggesting the total stoppage of sealing on land and sea for two or three years by both governments, this was not insisted upon.

The liability of the United States for damages on account of the captured sealers seems clear from this award, but no sum of damages was assessed. This will require future negotiation. It will be interesting to see whether indirect damages for increased insurance, and for loss of prospective earnings will be claimed as in the *Alabama* cases. For damages on the score of loss of prospective earnings during the pendency of the arbitration proceedings, the treaty of April 18, 1892, which renewed the "*modus vivendi*" itself provides. It must be remembered that the freedom of the seas is upheld, so that subjects of third States are not debarred from hunting seals in any manner they may choose. Perhaps Russia and Japan and Mexico, France and Germany may be persuaded to accede to these rules. Otherwise there may be similar trouble with their subjects, or a transfer of sealing vessels to their flags. To include them was Mr. Bayard's intention in the negotiation undertaken near the close of the first Cleveland administration, and Russia had signified her assent.

This leads us to notice how completely the outcome of the whole matter proves to be on the lines then followed. Canada blocked the way, but surely it would have been wiser to persist in trying to secure what was wanted by further negotiation, rather than to try threats and force, to assume a position which has since proved, and which might have been seen to be, untenable. This mistaken line of action has resulted in further destruction of seal life, in the incurring of considerable liability for seizures, and in a good deal of unnecessary friction.

The official record of the Arbitration Proceedings, including the arguments of counsel has not yet been published so far as known. So that the arguments can be judged of only through meagre newspaper reports.

Not very much stress was laid in them upon the claim to jurisdiction over the Bering Sea. This was found untenable ground. But the claim to a property right in the Pribilof seals after their departure from the islands, was strongly and ingeniously urged. Here was an animal, whose skin is the basis of a considerable industry, with well defined habits attaching it to a certain portion of the United States' soil, putting to sea for the major part of the year, but always with the intention of returning. On land, the bearing, breeding and nursing processes were regulated and pro-

tected by a beneficent government. The killing process which also awaited a part of the herd, was properly restricted. A property right in the seals existed at the islands; it did not lapse when they put to sea, but like the ownership of pigeons in the air, of deer escaped from a preserve, of bees away from their hives, must be held to survive. The only practical alternative was extinction. The freedom of the seas for most purposes of course exists; but when in conflict with a case like the present, the laws of humanity, of self-defense, of State necessity, must be paramount. There were thus philosophical arguments as to the nature of property in seals, and a strong humanitarian plea for their preservation. A precedent for extraordinary jurisdiction over a portion of the high seas, was found in the British regulation of the pearl oyster fishery in Australasia.

The counter arguments of the British counsel were directed mainly to prove legally and historically a lack of jurisdiction over the Bering Sea vesting in the United States.

One may be allowed to say that the property claim was more subtle and ingenious than sound. It was novel, being for the first time applied to a free swimming animal. Moreover it does not seem to carry with it as a corollary the right to protect by force against the acts of subjects of other States, in violation of other and better established principles, the freedom of the high seas, and the immunity from search in time of peace. It furnishes a powerful plea for the protection of seal life rather than legal proof that one country has the right to undertake this desirable work single handed.

In view of the award a property right in the seal at sea must be declared non-existent. The issue is likely to be happier for its failure. Such an inroad upon the broad principle of a free high sea, which this country has been foremost in maintaining, would have been regrettable, and might have led to other and more serious trouble.

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